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APPLICATION NO. ___

IN THE

Supreme Court Of The United States

OCTOBER TERM 1993

ELBERT L. SUGGS,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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43 pp

QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit should be overruled because it conflicts with decisions from another United States court of appeals by holding that in a prosecution for conspiracy to distribute drugs evidence of preconditions to an agreement for sale not being met is irrelevant to proving the existence of an agreement.

CERTIFICATE OF INTERESTED PERSONS

Solicitor General	Honorable Drew S. Days III Department of Justice Office of Solicitor General 10th Street and Constitution Avenue NW Room 5143 Washington, D. C. 20530
Trial Judge	Honorable Thomas A. Higgins U.S. District Court Judge Middle District of Tennessee Columbia Division 800 U.S. Courthouse Nashville, TN 37203
Respondent's Counsel	Honorable Ernest W. Williams United States Attorney Honorable Harold B. McDonough Assistant U.S. Attorney 110 9th Avenue South Suite A-961 Nashville, TN 37203
Sixth Circuit Judge Panel	Honorable Justice Jones U.S. Court of appeals Judge Sixth Circuit Court of Appeals Honorable Justice Suhrheinrich U.S. Court of Appeals Judge Sixth Circuit Court of Appeals Honorable Justice McKeague[1] 538 U.S. Post Office and Courthouse Building Cincinnati, OH 45202-3988

[1]The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

Petitioner's Counsel	William J. Baxley David McKnight Baxley, Dillard, Dauphin & McKnight 2000 16th Avenue South Birmingham, AL 35205

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1) because this Petition is from a decision of the Sixth Circuit Court of Appeals in a criminal case.

(i) Date of the decree: January 10, 1994.

(ii) No rehearing or extension of time has been sought.

(iii) No cross-petition has been filed.

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(a) of the Rules of the Supreme Court.

STATUTES INVOLVED IN THE CASE

21 U.S.C. § 841. Prohibited Acts.

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance:

21 U.S.C. § 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition

On September 16, 1992, an indictment was filed naming Phillip Kemp Williams and Elbert Ladale Suggs as defendants. The indictment charged these two defendants, in two separate counts, with conspiracies to possess marijuana and cocaine with the intent to distribute. (R. 1: Indictment).

Defendant Suggs was arrested on September 23, 1992 and released on a $5,000 bond. (R. 7, 8: Magistrate's Resume). Defendant Suggs entered a plea of not guilty. (R. 12: Waiver of Defendant Suggs). The trial court set the matter for trial on December 8, 1992. (R. 39: Court Order).

The trial commenced on December 8, 1992. (R. 62: Clerk's Resume of December 8-14, 1992, Trial). At the close of the government's evidence, defendant Suggs filed a Motion for Judgment of Acquittal. The basis of the motion was that the government had failed to establish an essential element of the conspiracies, namely an agreement among conspirators. (R. 60: Suggs' Motion for Judgment of Acquittal).

Suggs' Motion for Judgment of Acquittal was denied and the defendants were found guilty by the jury of Counts 1 and 2. (R. 62: Clerk's Resume of December 8-14, 1992, Trial). Defendant Suggs was released pending sentencing. (R. 72: Amended Order of Release). Sentencing was set for March 1, 1993.[2] (R. 70: Notice of Sentencing). Defendant Suggs was sentenced to serve 121 months on Count Two and 60 months on Count One. Said sentences were to run concurrently. (R. 89).

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[2] Suggs co-defendant, Williams committed suicide the night before the sentencing.

Defendant Suggs began serving his sentence immediately after the sentencing hearing.

(II) Statement of Facts With References to Record

The principals involved in the alleged conspiracy include: Robert Wayne Rushing (working undercover with the government); Jerry Glen Hitchcox; John H. Albertson, III (a government agent); Phillip Williams (co-defendant) and Dale Suggs (petitioner).

The alleged conspiracy was presented in the form of various telephone conversations and three meetings. These facts will be presented in relation to each of these meetings.

i) First Meeting: June 8, 1992

The government introduced evidence that two meetings took place prior to the arrest which occurred at the third meeting on July 7, 1992. At the first meeting, Rushing introduced undercover trooper Albertson to Williams. This meeting occurred at a restaurant known as the Big Chicken which is located at the Tennessee/Alabama state line. (Bob Rushing at TR 89, 90). Albertson brought 16.4 pounds of marijuana to the meeting. (John Albertson at TR 269). Suggs was not present at this meeting and Rushing had not had any contact with Suggs prior to that meeting. (Bob Rushing at TR 138). Hitchcox was also present at the meeting and did not remember any mention of Williams wanting to show a sample of the marijuana to Suggs. (Jerry Hitchcox at TR 202). Albertson remembered Williams stating that he could show the sample to several people but did not mention Suggs. (John Albertson at TR 271). After this meeting, Rushing continued to have constant daily contact with Williams over the next two weeks. (Bob Rushing at TR 91, 92).

ii) Second Meeting: June 2 6, 1992

Prior to the second meeting there were several conversations which were presented to the jury by tape recordings. The first occurred on June 24, 1992 between Hitchcox and Albertson over the phone. (Jerry Hitchcox at TR 207, 210). The second was another phone conversation between Hitchcox and Albertson concerning the scheduling of the meeting on the 26th. That conversation includes price negotiations. Hitchcox mentions that Suggs is a secondhand man for James. (Jerry Hitchcox at TR 211). The third conversation occurred on the same date between the same people. Hitchcox states that Williams says Suggs will have the money in the car. (Jerry Hitchcox at TR 212-216). The so-called second meeting was really a non-event. Rushing, Hitchcox and Albertson were scheduled to meet Williams at the Big Chicken on June 26, 1992. Albertson picked up Rushing and Hitchcox in Nashville and drove to the restaurant but Williams never showed up. (Bob Rushing at TR 94, John Albertson at TR 278, 279). After the meeting, Albertson wanted to handle the matter himself rather than allow Rushing and Hitchcox to handle it because he did not want any "more mix-ups". (Bob Rushing at TR 95; John Albertson at TR 279). Albertson and Williams then began making arrangements behind Hitchcox back. (John Albertson at TR 280).

iii) Third Meeting: July 7, 1992

A phone conversation took place between Albertson and Williams on June 27, 1992. This conversation included a discussion of why nobody showed up at the meeting on the 26th. (John Albertson at TR 282). Another conversation between Williams and Albertson occurred on July 2, 1992. Williams says he has been in touch with his people and mentions three or four differ-

ent names. (John Albertson at TR 284, 285). On July 2, 1992, three telephone conversations between Hitchcox and Albertson concerned negotiations regarding the price of marijuana and Albertson mentioned some cocaine. (Jerry Hitchcox at TR 218). On July 3, 1992, Williams had talked to Hitchcox and wanted to verify what he had discussed with Albertson. (John Albertson at TR 285, 286). On July 6, 1992, Williams and Albertson are still negotiating over the price. Albertson quotes a price of $24,500 per kilo of cocaine and Williams wants it reduced to $21,500. (John Albertson at TR 287-9). On July 6, 1992, Williams and Albertson have two more phone conversations verifying the time and place of the meeting on the 7th. (John Albertson at TR 290, 291). The final recorded phone conversation occurred on July 6, 1992. This conversation is between Hitchcox, Rushing and Albertson. The purpose is to set up the meeting on the 7th. (Jerry Hitchcox at 220-222).

The third and final meeting took place on July 7, 1992 at the Big Chicken once\again. Rushing, Hitchcox and Albertson drove in one car, arrived at the restaurant and waited about thirty minutes for Williams and Suggs to show up. (Bob Rushing at TR 95, Jerry Hitchcox at TR 204). Albertson, Hitchcox and Rushing were waiting in a booth in the restaurant when Williams showed up and said Dale Suggs was in the car. They all left the building and went out to the car. (Jerry Hitchcox at TR 223). Albertson told Williams that he was going to have to see at least half of the money to be assured that they were legitimate. He said that he had the drugs up the road in another vehicle and once he was satisfied, he would page them to come down. (John Albertson at TR 294). Williams said he did not know how much money Suggs had. (John Albertson at TR 294). Albertson got in the passenger side of the front seat, Suggs was driving and Williams was in the back seat. Rushing was outside sitting on the

front fender of the car. Hitchcox was standing by the passenger door. Albertson told Suggs that he needed to see some money, at which point Suggs showed him a roll of money totalling $4,452.00. Albertson then said that he would call and have the drugs brought over. (Jerry Hitchcox at TR 204, 205, 223; John Albertson at TR 294-297, 300). Albertson left and paged the other officers to come in for the arrest.

Albertson returned to the car and had a conversation with Suggs. Suggs asked, "What does the green look like?" Albertson told him that it was better quality marijuana but that the price of it was negotiable. A short time later Suggs asked about the "white". Albertson said it looked good and cost $20,700 for a kilogram. Suggs said that he thought he could get it cheaper somewhere else. (John Albertson at TR 295-297). There was no discussion as to the amount of drugs at this meeting and neither Albertson or Hitchcox had had any prior conversation with Suggs along those lines. (Jerry Hitchcox at TR 249; John Albertson at TR 335). Shortly thereafter, four or five cars pulled up with twelve officers and handcuffed everybody and took them to the police station. (Jerry Hitchcox at TR 205, John Albertson at TR 297, 333). Albertson has no personal knowledge of a second car being present at this meeting. (John Albertson at TR 334, 335).

Rushing did not hear any conversation between Williams and Suggs. (Bob Rushing at TR 147). Rushing did not know of any agreement between Williams and Suggs and had no idea why Suggs was present. (Bob Rushing at TR 157). At this third meeting, Suggs did not have half the money as it had been represented that he would. Suggs never saw or touched any cocaine. Suggs never saw or touched any marijuana. Suggs never said that he wanted to buy any drugs on that occasion. Suggs never mentioned there was a deal he wanted to transpire at this

meeting. Hitchcox never heard any conversations between Williams and Suggs about an agreement to purchase drugs on this date. To complete the transaction, the defendants would have had to produce $141,400. In fact Suggs only had $4,452.00 with him. This was less than 3% of the required amount. (Jerry Hitchcox at TR 249-252; John Albertson at TR 328-331).

(III) Basis for Federal Jurisdiction in Court of First Instance

This case involved an appeal from a criminal conviction in the United States District Court for the Middle District of Tennessee. The Sixth Circuit was the appropriate Appellate Court to entertain the appeal pursuant to 28 U.S.C. § 41 and had jurisdiction over such final decision pursuant to 28 U.S.C. § 1291.

ARGUMENT

(I) Scope of Review

On appeal " [t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The jury's verdict should not be upheld if the government has failed to present substantial evidence concerning the individual defendant's participation in the alleged conspiracy. *See Burks v. United States,* 437 U.S. 1, 17 (1978); *Hamling v. United States,* 418 U.S. 87, 124 (1974) (quoting *Glasser v. United States,* 315 U.S. 60, 80 (1942)); *United States v. Tolliver,* 992 F.2d 1218 (6th Cir. 1993); *United States v. Durrive,* 902 F.2d 1221 (7th Cir. 1990).

(II) Amplification of Reasons for Allowance of Writ

The defendant, Elbert Ladale Suggs, was charged in the indictment of conspiring to possess marijuana and cocaine with intent to distribute, acts which are in violation of 21 U.S.C. §§ 841(a)(1) and 846. According to the Sixth Circuit Court of Appeals, the elements of a drug conspiracy offense are:

> 1) [T]he defendants entered into an agreement to manufacture, distribute and possess with intent to distribute [controlled substances]; 2) they did so willingly; and 3) one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy.

United States v. Blakeney, 942 F.2d 1001, 1009 (6th Cir. 1991) (citations omitted and emphasis added). The element that is at issue here is the first. On appeal to the Sixth Circuit, Suggs argued that the government had failed to prove the existence of an agreement.

What is necessary to prove the existence of an agreement? The Sixth Circuit has held that:

> The government need not prove that the agreement was formal or express. A conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan. The existence of a conspiracy to violate federal law may be established by a tacit or mutual understanding among the parties.

Blakeney, 942 F.2d at 1009 (citations omitted). Here, there was no express agreement so the issue revolves around what factors a court should consider in determining whether the government has proven a tacit or mutual understanding. Most significantly, the parties had at-

tached certain preconditions which must be met prior to the formation of an agreement which would include Suggs. Naturally, the failure of these preconditions meant that an agreement was never entered into. However, the Sixth Circuit determined that these unmet preconditions were "irrelevant". (Sixth Circuit Opinion page 5, see appendix).

What were the preconditions? The evidence at trial was as follows:

Trooper Albertson set the precondition that Suggs had to show him half of the money before he would show Suggs any drugs. (John Albertson at TR 293). This was common knowledge among the parties because Albertson told it to Williams and Williams told it to Hitchcox. (Jerry Hitchcox at TR 249; John Albertson at TR 293). Was this precondition satisfied? No. Suggs would have needed to have $75,700.00 but instead had only $4,452.00, less than 3% of the total amount necessary to complete the transaction. (Jerry Hitchcox at TR 251).

Suggs had his own precondition. He was going to have to see the drugs before he would agree to anything. Minutes before the arrest, Williams told Albertson that he needed to show Suggs a sample of the drugs to find out if he was interested. (John Albertson at TR 331). Suggs was never shown any drugs. Another unsatisfied precondition. Albertson was aware and consented to this precondition as shown when he fatally volunteered the following on cross-examination:

> Q. The deal was to purchase one hundred pounds of marijuana and two kilos of cocaine, right?
> A. I'm sure he wanted to see it before he buys it. I don't think he would want to buy anything he hadn't saw (sic). (John Albertson at TR 332).

Albertson went on to repeat this same statement when he stated that he "imagine[d] Mr. Suggs and Mr. Williams would look at the drugs, if they decided that's what they wanted they would then purchase them". (John Albertson at TR 332).

Even after Albertson had paged the surveillance officers to close in, he told Suggs that he could look at the marijuana and they would negotiate the price later. Albertson also told Suggs that he could probably get the cocaine cheaper somewhere else. (John Albertson at TR 297). Albertson further told Suggs that he would not want some of the marijuana. (John Albertson at TR 303). Seconds before the arrest, there was still no meeting of the minds.

If any further proof of the lack of an agreement was required it was provided by Trooper Albertson. Under questioning by the government's attorney, Albertson stated that he was going to have to see some money before he would show them any drugs, and then admitted:

> If they wanted it they could take it, if they didn't want it they didn't have to take it. If they wanted something better, we would try to provide them with something better. (John Albertson at TR 294).

Thus, there were clear preconditions set by the parties which were unmet. The court below erred in holding that these preconditions were "irrelevant".

In contrast to the Sixth Circuit's holding, several other United States courts of appeal have deemed evidence of unmet preconditions to be crucial in considering drug conspiracy cases. Some circuits have looked to see if there were unmet preconditions to the forming of the alleged agreement. *See United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980). Other circuits have looked to see if there were unmet preconditions to the perfor-

mance of the criminal objective of an already established agreement. *See United States v. Jones,* 765 F.2d 996 (11th Cir. 1985). The First Circuit has gone so far as to try and determine if the coconspirator believed the condition likely to be filled. *See United States v. Anello,* 765 F.2d 253 (1st Cir. 1985).

The Sixth Circuit had not previously ruled on whether unmet preconditions should be considered in a drug conspiracy case. However, when faced with evidence in this case that an agreement had not been formed because of unmet preconditions, the court proceeded to brush aside the evidence as "irrelevant." From this curt treatment of the issue, it impossible to know if the court meant that unmet preconditions are irrelevant in determining the existence of an agreement or in determining liability for an already established agreement. In either event, the court's decision conflicts with decisions in other circuits.

The case at bar is factually similar to a case decided by the Ninth Circuit. In *United States v. Melchor-Lopez,* that court reversed a conviction for conspiracy to import heroin and cocaine, finding that "the evidence offered . . . to show an agreement between the appellants and Salvatore Rina falls short of the minimum required under the precedents of this circuit." *United States v. Melchor-Lopez,* 627 F.2d 886, 891. As the court explained:

> Here the government proved that each appellant engaged in conversations which might have ended in firm commitments but it failed to establish the "meeting of the minds" to consummate an illegal transaction which is essential to conspiracy.

Id. at 892.

In its prosecution of the first appellant, the government had relied on a meeting where the appellant had "certainly expressed an interest in 'doing something'" but had "refused to commit himself unless the money were delivered in advance, which did not occur." *Id.* at 891. The court pointed out that the defendant had "agreed to nothing more than his appearance at the . . . meeting." *Id.* at 892. Thus, the court held that "absent proof of other contacts establishing a 'meeting of the minds' . . . the inferences urged by the Government are too tenuous to support a conclusion by a rational juror of appellant's guilt beyond a reasonable doubt, and, accordingly, his conviction cannot stand." *Id.* In other words, "partial acceptance of proposals, but stating a precondition not met, is not a conspiracy." *United States v. Jones,* 765 F.2d 996, 1003 (11th Cir. 1985) (stating that the Ninth Circuit's holding as to the first appellant was sound).

As for the second appellant in *Melchor-Lopez,* the government introduced evidence that he had attended the same meeting and while there had spoken extensively about potential pricing and delivery of drugs. *Melchor-Lopez,* 627 F.2d at 892. Although "he came closer to the line separating preliminary negotiations and active participation," the court held that "he did not cross it." *Id.* Significantly, the meeting had not culminated in an agreement to purchase drugs, only in an agreement to negotiate a drug purchase. *Id.* Pointing out that "[t]he law requires more than a conspiracy to attempt to arrange a purchase," the court held that no agreement had been proven and reversed the second appellant's conviction. *Id. See also United States v. Giunta,* 925 F.2d 758 (4th Cir. 1991) (agreement between alleged coconspirators to help willing buyer of drugs find willing seller does not by itself establish an agreement between the brokers).

Later Ninth Circuit cases have emphasized that the conditions precedent in *Melchor-Lopez* had to do with the very existence of an agreement between the alleged coconspirators, not with the fulfillment of the ultimate aim of an already existing agreement. *See United States v. Sharif*, 817 F.2d 1375 (9th Cir. 1987); *United States v. Kiriki*, 756 F.2d 1449 (9th Cir. 1985); *United States v. Escalante*, 637 F.2d 1197 (9th Cir. 1980); *United States v. Pemberton*, 853 F.2d 730 (9th Cir. 1988). Such a distinction has also been drawn by the Seventh Circuit. *See United States v. Podolsky*, 798 F.2d 177, 178 (7th Cir. 1986) ("Of course, if the condition is a condition not of committing the agreed-upon acts . . . , but of agreeing in the first place, there is no criminal conspiracy unless and until the condition is satisfied.").

Like the appellants in *Melchor-Lopez*, Suggs had not entered into any agreement because of certain unmet preconditions. The government's evidence showed only that his alleged coconspirators had participated in preliminary negotiations. No evidence indicated that Suggs had been a party to those negotiations. Even if he had been, a precondition to sale was that the buyer produce half of the necessary money — a precondition that was never met. (John Albertson at TR 293, 338; Jerry Hitchcox at TR 249, 251). Suggs, like the first appellant in *Melchor-Lopez*, merely showed up at a prearranged meeting expressing an interest in the quality and price of the drugs being offered for sale. His precondition for purchase — that he see the drugs before agreeing to anything — was also never met. (John Albertson at TR 297, 331, 332).

The court below erred in not considering the ample evidence of unmet preconditions which was presented in this case. Had Suggs' appeal been heard in the Ninth Circuit, the court would have considered such evidence in determining if the government had in fact established that an agreement existed. In all likelihood, the Ninth

Circuit would have found that no agreement had been shown and would have reversed Suggs' conviction.

A factually different situation would exist if the government had shown an agreement but there had been unmet preconditions to completion of the coconspirators' criminal objective. Such was the situation in *United States v. Jones*, 765 F.2d 996 (11th Cir. 1985). The Eleventh Circuit in that case defined the issue as "whether an 'agreement' to submit proposals to a third party, with preconditions never accepted, can be all by itself such an 'agreement' as the law denounces as a criminal conspiracy?" *Id.* at 1003. The court reversed a conviction for conspiracy to import and distribute marijuana which was based on evidence that the codefendants had submitted proposals to a third party to enter into a joint venture but their proposals had not been accepted. *Id.* According to the court, "specially tailored proposals" do not support an inference of a continuing agreement — at least, not "when the circumstances do not justify an inference of fact that the 'agreement' survives the rebuff." *Id.* The court held that "mere submission of proposals such as we have here, with preconditions not met" is not a criminal conspiracy. *Id.*

Unlike the case at bar, the defendants in *Jones* had reached an agreement among themselves to do a specific illegal act. A precondition to the accomplishment of their criminal objective was that a certain third party agree to finance their plan. This precondition was not met because that person refused to accept their proposal. *Id.* at 1002. In contrast, the government here failed to show that Suggs had ever reached any sort of agreement with his alleged coconspirators. Even if he had, the court would have erred in not considering the fact that no sale could go through without the buyer first producing half of the money — a precondition never met. If Suggs' appeal had been heard in the Eleventh Circuit, the court

would have considered such evidence in determining if the agreement was such "as the law denounces as a criminal conspiracy." In all likelihood, the court would have found that it was not and would have reversed Suggs' conviction.

The Eleventh Circuit later refined its test for determining which agreements are such "as the law denounces." In *United States v. Prince*, 883 F.2d 953 (11th Cir. 1989), the court affirmed a conviction for possession of marijuana with intent to distribute, but in doing so applied a principle derived from the First Circuit. That principle was that "a conditional agreement to buy may support a conspiracy conviction only if the potential buyer believes the condition likely to be fulfilled." *Id.* at 958 (citing *United States v. Anello*, 765 F.2d 253 (1st Cir. 1985)). In the instant action, there was no evidence that Suggs believed any of the conditions would be fulfilled. Contrary to the case at hand, the court in *Prince* found no evidence that the defendant had imposed the alleged precondition — that the marijuana be seedless — prior to his rejection of the marijuana. Had that court been faced with the clear preconditions presented in Suggs' case, its decision would have been different. The point is: the court looked for the preconditions and considered them in its opinion. The Sixth Circuit however, has refused to do so.

Similarly, the First Circuit also affirmed a conviction for conspiracy to possess marijuana with intent to distribute. *See United States v. Anello*, 765 F.2d 253 (1st Cir.), *cert. denied*, 474 U.S. 996 (1985). The court in *Anello* found that the jury could reasonably infer that the defendant "had at least agreed conditionally to 'purchase marijuana with an intent to distribute it' — i.e., he agreed to buy it if the quality was adequate." *Id.* at 262 (emphasis in original). The court pointed out that an agreement to buy which is subject to a condition is still an agreement, "at

least as long as the potential buyer believes the condition likely to be fulfilled." *Id.* (citing *United States v. Feola,* 420 U.S. 671 (1975); *United States v. Grassi,* 616 F.2d 1295 (5th Cir. 1980), *cert. denied,* 449 U.S. 956 (1980); Note, "Conditional Objectives of Conspiracies," 94 Yale L.J. 895 (1985)).

Significantly, the government produced evidence in *Anello* showing that the defendant "believed the conditions likely to be fulfilled". This evidence, included that the defendant "came to Bangor the same day he was summoned, brought a large amount of cash, held numerous discussions, and was still in Bangor at least two days after he had seen the marijuana." *Anello,* 765 F.2d at 263. According to the court, this evidence was sufficient for the jury to conclude that the defendant's condition was not likely "to prove a serious impediment to the plan." *Id. See also United States v. Dworken,* 855 F.2d 12 (1st Cir. 1988) (cited Model Penal Code § 5.01(1)(c) (1985) in holding that "liability should attach if the defendant reasonably believed that the conditions would obtain").

Unlike its case in both *Prince* and *Anello,* the government here failed to produce sufficient evidence for the jury to reasonably infer that Suggs had entered into any kind of agreement with his alleged coconspirators. Even if it had, the government also failed to produce sufficient evidence for the jury to reasonably conclude that Suggs believed his condition of seeing the drugs was likely to be fulfilled. If Suggs had believed so, surely he would have brought along more than just three percent of the money necessary to complete the transaction. (John Albertson at TR 297-98; Jerry Hitchcox TR at 251). Unlike the defendant in *Anello,* Suggs did not communicate with his alleged coconspirators and then travel to another town and stay in the same hotel that they were staying in. *Anello,* 765 F.2d at 262. Suggs' involvement is

much more incidental, and any desire on his part to purchase drugs is not supported by any evidence.

Clearly, had Suggs' appeal been heard in the Ninth, the Eleventh or the First Circuit, the fact that there were unmet preconditions to the sale would have been a factor worthy of consideration. Such evidence would reflect on whether in fact there was an agreement in the first place. In addition, it would reflect on whether a proven agreement was one such as "the law denounces."

By refusing to consider evidence of unmet preconditions, the Sixth Circuit has set too low of a standard for conviction in a drug conspiracy case. Under its standard, the government need only show that the defendant's name was mentioned by a codefendant as a potential buyer, that he appeared at a meeting arranged by that codefendant, and that at the meeting he expressed an interest in the quality and cost of the drugs being offered for sale. According to the Sixth Circuit, it is "irrelevant" that the defendant never even got to see the drugs and that he was not going to agree to anything until he did. And it is also "irrelevant" that the defendant only brought a small fraction of the money that would have been necessary for a purchase to be completed.

Public policy supports Suggs' contention that the court below should have considered evidence of unmet preconditions. Even before the national "war on drugs," this Court worried about potential overuse of the "elastic, sprawling, and pervasive offense" of conspiracy. *Krulewitch v. United States,* 336 U.S. 440, 445 (1949). This concern has proven to be warranted. In 1978, the Fifth Circuit noted that the Court's forebodings in *Krulewitch* "about the pervasive use of conspiracy counts had been borne out in the ensuing thirty years during which conspiracy had remained a 'potent and oft-used weapon in the prosecutorial arsenal.'" *United States v. Giunta,* 925 F.2d 758, 765-66 (4th Cir. 1991) (quoting *United States v.*

Caro, 569 F.2d 411, 418 (5th Cir. 1978)). According to the Fourth Circuit:

> [T]he very "elasticity" of the conspiracy concept may and frequently does tend to produce more "slippery" facts in proof than do prosecutions for less "elastic" substantive offenses, with a corresponding greater danger that speculation rather than reason may be required to make the necessary leaps of inferences to find guilt.

Giunta, 925 F.2d at 766.

When should an agreement be inferred? According to the Eleventh Circuit, "[c]ourts should not use the term 'agreement' and then define it out of existence." *United States v. Jones*, 765 F.2d 996, 1002 (11th Cir. 1985). That court warned that caution should be employed in setting the standard for when a jury can reasonably infer the existence of an agreement. As the court noted:

> Of course, the law could be written to punish one who seriously contemplated participating in a drug smuggling enterprise, but it has not yet done so.

Jones at 1003.

The risk of unfairness in conspiracy prosecutions is even greater when the alleged conspiracy was not consummated. In such cases "the looseness of practice to be feared is the undertaking of shaky conspiracy prosecutions when the firmest evidence of conspiracy — its consummation — is not available." *Id.*

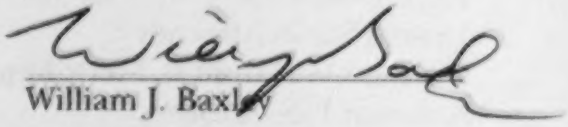
One way to guard against such dangers is to take into consideration evidence of unmet preconditions. While the Ninth, Eleventh and First Circuits have considered such evidence, the Sixth Circuit has refused to do so. This Court should resolve the conflict by holding that evidence of unmet preconditions is a factor to be consid-

ered in determining if there is an agreement and in determining if an existing agreement is one that "the law denounces as criminal." Because the court below refused to consider such evidence, this case is due to be reversed and remanded.

CONCLUSION

The Sixth Circuit Court of Appeals held that the unmet preconditions, required to have an agreement, were " irrelevant". This holding is illogical, contrary to the decisions of the Courts of Appeals for the First, Ninth and Eleventh Circuit and constitutes an impermissible extension of the already expansive conspiracy law. If a party has set certain preconditions which must be meet before he agrees to enter an agreement, then he has not entered an agreement and therefore the first required element of the law of conspiracy has not been met. For the foregoing reasons this Petition should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing has been served by being placed in first class mail, properly addressed and with postage prepaid, this the 11th day of April, 1994, on all counsel of record as follows:

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NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Case Nos. 93-5357

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	ON APPEAL FROM THE
	)	UNITED STATES
Plaintiff-Appellee,	)	DISTRICT COURT
	)	FOR THE MIDDLE
v.	)	DISTRICT OF
	)	TENNESSEE
ELBERT L. SUGGS,	)	
	)	
Defendant-Appellants.	)	
	)	

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BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and McKEAGUE, District Judge.*

PER CURIAM. Defendant-Appellant Elbert Ladale Suggs appeals his conviction on two counts of conspiracy to possess marijuana and cocaine with intent to distribute (in violation of 21 U.S. C. §§ 841(a)(1) and 846). On appeal, he argues that: (1) the government failed to provide all of the elements of conspiracy; (2) the trial court erroneously admitted evidence of prior wrongful acts; (3) the trial court misapplied the sentencing guidelines;

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*The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

and (4) he is entitled to have his conviction reversed or to have a new trial due to the death of his co-conspirator. We find that these arguments are without merit, and we affirm both the conviction and the sentence.

I. FACTS

In early 1992, Robert Wayne Rushing, who was working for the FBI and the Tennessee Highway Patrol as a paid informant in undercover drug investigations, introduced Tennessee state trooper John Albertson, working undercover, to Jerry Hitchcox. Hitchcox and Rushing sold drugs together before Rushing became an informant. Albertson told Hitchcox he was looking to put together a drug deal. Rushing and Hitchcox contacted Phillip Kemp Williams, who responded that he could find a buyer. Williams named the defendant, Suggs, as a potential buyer. Williams arranged for Albertson to meet Suggs in order for Albertson to sell marijuana and cocaine to Suggs.

Albertson, Rushing, Hitchcox, Williams, and Suggs met at a truckstop in Tennessee near the Alabama border on July 7, 1992. Williams introduced Albertson to Suggs and told Suggs that Albertson had both marijuana and cocaine to sell. Suggs showed Albertson a wad of money ($4,452). The money that Suggs had, however, was a very small fraction of the amount he would have needed to complete the deal. Nevertheless, Albertson told Suggs that he would call to have the drugs brought over. Instead, Albertson signalled surveillance officers to come and make arrests. While waiting for the drugs, Suggs asked Albertson what the drugs looked like and how much they would cost. At this point, Hitchcox, Rushing, Williams, and Suggs were taken into custody. Suggs had not yet stated whether he intended to purchase the drugs, and had not seen or touched them.

Suggs and Williams were tried together as co-conspirators. At trial, the government's case consisted of the testimony of Rushing, Hitchcox, and Albertson, along with several taped phone conversations, primarily between Hitchcox and Albertson, and Albertson and Williams. The testimony indicated that Suggs had bought drugs from Rushing and Hitchcox on two prior occasions before Rushing began working as an informant.[1] On December 14, 1992, the jury found Suggs and Williams guilty on both counts.

This trial court sentenced Suggs to 121 months of imprisonment on count 2 and 60 months on count 1, to run concurrently, along with 5 years of supervised released. Williams died prior to being sentenced, and the trial court granted the government's motion to dismiss the action against Williams on March 2, 1993. Suggs moved to vacate his conviction on the ground that the dismissal of Williams's conviction resulted in Suggs being convicted for a single person conspiracy. The trial court denied this motion. This appeal followed.

II. DISCUSSION

A. Sufficiency of Evidence

In *United States v. Blakeney*, 942 F.2d 1001, 1009 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992), we held that:

> The elements of the drug conspiracy offense are the following: (1) the defendants entered

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[1] In March 1991, Rushing, Hitchcox, and another man arranged to sell marijuana at Williams's house in Alabama. Williams arranged for Defendant Suggs to examine the marijuana. Suggs bought 92 pounds of it. A month and a half later, the same men met again at Williams's house and Suggs bought a kilogram of cocaine. Rushing began working as an informant in February 1992.

> into an agreement to . . . possess with intent to distribute [controlled substances]; (2) they did so willingly; and (3) one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy.

To prove the first element, the government does not need to prove the existence of a formal or express agreement — a tacit or mutual understanding among the parties that they are working to accomplish an unlawful goal is sufficient. *Id.* at 1009-10 (citing *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989); *United States v. Hughes*, 891 F.2d 597, 601 (6th Cir. 1989)). Such a tacit understanding can be inferred from circumstantial evidence. *Id.* at 1010 (citing *United States v. Bavers*, 787 F.2d 1022, 1026 (6th Cir. 1985)). However, mere association among the parties is not sufficient to establish a conspiracy. *Id.* (citing *United States v. Pearce*, 912 F.2d 159, 162 (6th Cir. 1990), *cert. denied*, 498 U.S. 1093 (1991).

Suggs contends that the government failed to prove the first of these elements, the existence of an agreement. This amounts to a claim that the evidence against Suggs was insufficient to support a conviction. According to Blakeney:

> The relevant inquiry when reviewing claims of insufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Circumstantial evidence and direct evidence are accorded the same weight and "'the uncorroborated testimony of an accomplice may support a conviction under federal law.'" *United States v. Frost*, 914 F.2d 756, 762 (6th Cir. 1990) (quoting

> *United States v. Gallo*, 763 F.2d 1504, 1518 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986)). Therefore, we will reverse a judgment for insufficiency of evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence. *Ellzey*, 874 F.2d at 328.

Id.

There was ample evidence from which a rational jury could infer that Suggs conspired to purchase marijuana and cocaine. The evidence indicated that Williams named Suggs as a potential buyer in taped telephone conversations, that Williams arranged a meeting between Suggs and Albertson for the express purpose of enabling Suggs to buy drugs, and that Suggs appeared at the meeting expressing an interest in the quality and cost of Albertson's drugs. From this evidence, it was rational for the jury to find that Suggs had a tacit or mutual understanding with Williams that they were working together toward the unlawful goal of enabling Suggs to purchase cocaine and marijuana.

Suggs argues that there was no evidence of an *express* agreement between Suggs and Williams, that the drug transaction with Albertson was never consummated, and that, due to unmet preconditions, Albertson and Suggs never reached an agreement that Suggs would buy Albertson's drugs.[2] These considerations are all irrelevant. In order for an unlawful conspiracy to exist, it is not necessary that any agreement be express, that any actual drug transaction was consummated, nor that various preconditions for the sale of drugs were met. All that is necessary to establish the first element of a conspiracy

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[2]According to Suggs, there were two unmet preconditions. First Suggs did not have enough money to buy the drugs, and second, Albertson had not yet allowed Suggs to inspect the drugs.

to buy drugs is that the defendant had a tacit or mutual understanding with a co-conspirator that the two were working together toward the unlawful goal of possessing drugs with intent to distribute.

Suggs also argues that there was no evidence that the alleged conspirators had any agreement to distribute the drugs. The government correctly responds that an intent to distribute can be inferred from the quantities of the drugs that were to be purchased. *United States v. Dotson*, 871 F.2d 1318, 1323 (6th Cir. 1989) (citing *United States v. Faymore*, 736 F.2d 328, 333 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984)).[3] Albertson testified that when someone deals in pounds of marijuana and in kilograms of cocaine, they do so with the intent to distribute it. Thus, the evidence was sufficient to establish the first element of the charged offense.

B. Evidence of Prior Wrongful Acts

The district court admitted evidence showing that, on two occasions in 1991, Williams made arrangements for Suggs to buy marijuana and cocaine from Rushing and Hitchcox at Williams's House. Suggs contends that this evidence was improperly admitted under Rules 403 and 404(b) of the Federal Rules of Evidence.

Rule 403 provides in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by

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[3] Part IIB of the *Dotson* decision, 871 F.2d at 1322-23, was vacated on other grounds. *United States v. Dotson*, 895 F.2d 263, 266 (6th Cir.), *cert. denied*, 498 U.S. 831 (1990). In the later *Dotson* opinion, we held that "The original opinion remains the opinion of the court on all issues" except for the one discussed in Part IIB. *Id.* at 264. The holding that an intent to distribute can be inferred from possession of large quantities of drugs occurred in Part IIIA of the original *Dotson* opinion, which therefore remains good law. 871 F.2d at 1323.

> the danger of unfair prejudice, confusion of issues, or misleading the jury . . .

Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Until recently, we reviewed a trial court's decisions to admit or to deny evidence under Rule 404(b) for abuse of discretion. *United States v. Gessa,* 944 F.2d 265, 268-69 (6th Cir. 1991), *vacated,* 971 F.2d 1257, 1261 (6th Cir. 1992) *(en banc); United States v. Passarella,* 788 F.2d 377, 384 (6th Cir. 1986). However, in *Gessa,* the en banc court reformulated this standard of review into a three part test:

> Although this court has frequently stated that we review 404(b) evidence under an abuse of discretion standard, we believe it is more precise to state the following. First, it must be determined as a matter of preliminary fact whether there is sufficient evidence that the prior act occurred. Second, a legal determination must be made whether the "other act" allegedly committed by the defendant was admissible as evidence of "intent, preparation, or plan." . . . Finally, in ruling on the admission of 404(b) evidence, the district court must determine whether the "other acts" evidence is more unfairly prejudicial than probative, which is governed by an abuse of discretion standard.

971 F.2d at 1261-62 (citations omitted). The first prong of the test is reviewed under the "clearly erroneous" standard, and the second prong is reviewed *de novo*. *Id.* As for the third prong, and as for the standard of review for Rule 403: "[i]t is well settled that a trial judge's discretion in balancing the probative value of evidence against its potential for unfair prejudice is very broad." *United States v. Dabish*, 708 F.2d 240, 243 (6th Cir. 1983).

In the present case, the first and third prongs of the test are easily met. Rushing and Hitchcox both testified that the prior acts occurred. There is nothing in the record to indicate that it was clearly erroneous for the district court to credit their testimony. Similarly, there is nothing in the record that suggests that the district court abused its discretion in holding that the probative value of the prior acts evidence outweighed any risk of unfair prejudice.

As for the second prong, we review *de novo* the district court's determination that the prior acts evidence was relevant to opportunity, intent, preparation, plan, knowledge, identity, and the absence of mistake or accident. In *Passarella*, 788 F.2d at 383-84, we held that evidence of prior drug dealings between the defendant and some of the same individuals involved in the case at trial was admissible, where the prior dealings were substantially similar and had occurred approximately one year before the matters alleged in the indictment. We found that the evidence was relevant to the background and development of the conspiracy, and it indicated that there was an on-going plan to engage in the sorts of drug crimes that were at issue in the case. *See also Gessa*, 971 F.2d at 1262; *United States v. Hitow*, 889 F.2d 1573, 1579 (6th Cir. 1989).

The instant case is similar to *Passarella* in all relevant respects. Accordingly, we hold that the prior acts evidence in the present case was relevant to preparation or

plan. It follows that, as per *Gessa,* the evidence was admissible under Rule 404(b). Given the broad discretion afforded a trial judge's balancing of probative value against risk of unfair prejudice, the evidence was also admissible under Rule 403.

Suggs emphasizes that the government spent over half of its direct examination of Rushing dealing with the prior acts, as well as a large portion of Hitchcox's direct examination. Suggs also stresses that the prior acts occurred over a year earlier than the charged conduct and were dissimilar in various ways. Suggs also points out that the evidence of the prior acts came solely from the testimony of Rushing and Hitchcox who, Suggs argues, are not credible witnesses. All of this is irrelevant. None of these considerations changes the result of applying the tripartite *Gessa* test to the instant facts.

C. Sentencing Guidelines

1. Amount of Drugs

Suggs contents that the district court improperly determined the amount of drugs that was the object of the conspiracy. A finding regarding the amount of drugs that are involved in an offense needs only to be supported by a preponderance of the evidence. *United States v. Davis,* 981 F.2d 906, 911 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 2361 (1993). The district court's finding in this regard is a finding of fact subject to a deferential "clearly erroneous" standard of review. *Id.* at 911-12; *see also* 18 U.S.C. § 3742(e); *United States v. Garner,* 940 F.2d 172, 174 (6th Cir. 1991). A finding of fact will only be clearly erroneous when, although there may be some evidence to support the finding, "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer,* 470

U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)).

The evidence produced at trial indicated that Williams told Albertson that "his people," which expressly included Dale Suggs, would buy two kilograms of cocaine and about 100 pounds of marijuana. From this evidence, the district court found that the object of the conspiracy was to purchase two kilograms of cocaine and 100 pounds of marijuana. We cannot say that this finding was clearly erroneous.

Suggs argues that he did not have enough money to purchase that amount, but the court noted that, in the 1991 drug transactions at Williams's house, Suggs also did not carry the drug buy money with him when he initially viewed the marijuana and cocaine. Consequently, the court rejected Suggs's claim that he was incapable of coming up with more money or of consummating the drug deal.

Suggs also points out that there was no agreement regarding the amount of drugs he might have bought from Albertson, and that, in the 1991 transactions, Suggs bought less than the full amount of drugs tendered. These facts do not render clearly erroneous the court's reliance on Williams's statements regarding the amount of drugs that "his people" would buy.

2. Minor Participant

Suggs claims that he was involved in the transaction for only fourteen minutes, and he argues that this makes him a "minor participant," entitled to a reduction in his sentence pursuant to U.S.S.G. § 3B1.2 ("a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal."). The court found, however, despite the brief duration of the meeting between Albertson and

Suggs, that Suggs was an organizer/leader in the drug transaction. Given that the length of the meeting between Albertson and Suggs was not the only indication of Suggs's involvement, Suggs has not shown the district court's finding to be clearly erroneous.

3. Family Circumstances

Suggs contends that he was entitled to a downward departure in sentencing due to extraordinary family circumstances. According to her physician, Suggs's wife, Rita, is unable to work due to a medical condition. Thus, she and Suggs's two children are dependent on Suggs for their livelihood and well-being. (The government notes that Suggs's two children are 17 and 18 years old). The district court found that these circumstances were not extraordinary enough to warrant a downward departure. This finding was well within the court's discretion, for "'"[a] district court's refusal to depart downward from a sentence within the properly computed guideline range is not appealable.'" *United States v. Morgan*, 986 F.2d 151, 152 (6th Cir. 1993) (quoting *United States v. Pickett*, 941 F.2d 411 (6th Cir. 1991)).

D. Death of Co-conspirator

Finally, Suggs contends that, when Williams dies and the action against him was dismissed, the "only link . . . between Suggs and the conspiracy is now removed from the chain." Williams is the only person with whom Suggs allegedly conspired, and "[a]s a general rule, the conviction of only one defendant in a conspiracy prosecution will not be upheld where all the other alleged coconspirators are acquitted." *United States v. Musgrave*, 483 F.2d 327, 333 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973).

Once again, Suggs's argument is without merit. In *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir. 1986), we held that, even though charges were dismissed against a coconspirator, the district court did not err by having the only remaining conspirator's motion to dismiss the conspiracy count against him. We agreed that "[i]t is clear that the crime of conspiracy cannot be committed by an individual acting alone since, by definition, conspiracy is a group offense." *Id.* Thus, "an acquittal on conspiracy charges as to all but one coconspirator mandates acquittal on conspiracy charges as to the remaining defendant." *Id.* (citing *United States v. Espinosa-Cerpa*, 630 F.2d 328, 331 (5th Cir. 1980)). However, we stressed that:

> if charges are never brought against other alleged coconspirators, if charges are dismissed against all other coconspirators, or if a coconspirator has not yet been tried, dismissal of all charges against the remaining conspirator is not required. *See, e.g., [United States v.] Sangmeister*, 685 F.2d [1124], 1126-27 [(9th Cir. 1982)] (dismissal of charges against coconspirator); *United States v. Shipp*, 359 F.2d 185 (6th Cir.) (one coconspirator had been granted a nolle prosequi and the other had not been tried), *cert. denied*, 385 U.S. 903 (1966); *Ng Pui Yu v. United States*, 352 F.2d 626, 633 (9th Cir. 1965) (charges against 13 of the 14 coconspirators were dismissed; "it is not necessary, to sustain a conviction for a conspiracy, that coconspirators be charged."). This is so because a dismissal of charges is not the equivalent of an acquittal. *United States v. Fox*, 130 F.2d [56], 58 [(3d Cir.), *cert. denied*, 317 U.S. 666 (1942)].

Id.

In the present case, Williams was not acquitted. The action against him was dismissed only because he died. As per Sachs, the district court did not err in denying Suggs's motion to dismiss on the basis that he was the sole remaining conspirator.

III. CONCLUSION

For the foregoing reasons, we affirm both Suggs's conviction and his sentence.